

and not otherwise. Fearing that words of mouth are proofless, this document is drawn as proof.

Signature to this document: Sd. Hew Foh (In Chinese)
Sd. Wong Kim

Witnesses: Sd. Woon Sak Seong
Sd. Foh Tat.

Dated the 16th day of the 3rd Month 1961 at 10.30 p.m."

Now Wong Kim is the second defendant and Hew Foh is the first defendant i.e. respondent. It is evident that this document upon which the plaintiff in that suit relied to substantiate his claim against the respondent, nowhere states that respondent guaranteed the payment of any money due by the second defendant for the supply of goods to him by the plaintiff. On the contrary it specially provides that any money owing by the workmen shall be dealt with by Wong Kim and shall not concern Hew Foh. All that was required of the respondent was that he shall not pay any money due to the workmen except in the presence of the plaintiff.

For these reasons I am of the view that the appeal against the judgment of the learned president would, if considered by the High Court in all probability have succeeded. I am of the view that ground 4 must also fail.

I would therefore dismiss the appeal with costs.

Ismail Khan and Gill JJ. concurred.

Appeal dismissed.

Solicitors: D. A. Devadason; Allen, Gledhill & Ball.

KOH TECK CHAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong Hock Sim J.) December 12, 1967]

[Penang—Criminal Appeal No. 49 of 1967]

Criminal Procedure — Withdrawal of charge — Discharge of accused — Whether discharge should amount to acquittal — Criminal Procedure Code (S.S. Cap. 21), s. 187(1); Criminal Procedure Code, (Cap. 6), s. 254(ii).

This was an appeal from the order of the learned magistrate at Penang made on June 13, 1967 when the appellant was discharged such discharge not amounting to an acquittal on an application by the prosecuting officer. Counsel for the appellant strongly objected thereto and submitted that no grounds had been given in support of the application and therefore the order should be a discharge amounting to an acquittal. A short adjournment was granted and the prosecuting officer on resumption gave as the reasons for his request first, that a civilian witness was still untraced and *subpoena* had not been served and secondly, it was intended probably to proceed against the appellant by way of departmental action. The learned magistrate gave as his ground for not granting appellant's counsel's request that "I held I had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal without a trial".

This case related to an offence alleged to have been committed on July 28, 1966 and the summons was

A applied for almost five months later on December 22, 1966. The case was finally called on June 13, 1967 when the order appealed from was made.

B Held: the power enabling the discharge of the accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. In the circumstances of this case the order of the learned magistrate should be varied so that the discharge should amount to an acquittal.

Cases referred to:—

- C (1) *Kuppusamy v. Public Prosecutor* [1948] M.L.J. 25.
- (2) *Seet Ah Ann v. Public Prosecutor* [1950] M.L.J. 293.
- (3) *Goh Oon Keow v. R.* [1949] M.L.J. 35.
- (4) *Tan Ah Chan v. R.* [1955] M.L.J. 218.
- D (5) *Ariffin bin Cassim Jayne v. Public Prosecutor* [1953] M.L.J. 126.

MAGISTRATE'S CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the respondent.

E Ong Hock Sim J.: This is an appeal from the order of the learned magistrate at Penang made on the 13th day of June, 1967 when the appellant was discharged not amounting to an acquittal on an application by the prosecuting officer. Counsel for appellant strongly objected thereto and submitted that no grounds had been given in support of the application and therefore the order should be a discharge amounting to an acquittal. A short adjournment was granted and the prosecuting officer on resumption gave as the reasons for his request first that a civilian witness was still untraced and *subpoena* had not been served and secondly it was intended probably to proceed against the appellant by way of departmental action. The learned magistrate gave as his ground for not granting appellant's counsel's request that "I held I had no power under the Criminal Procedure Code to discharge the accused, amounting to an acquittal without a trial".

H The learned magistrate in my view had in so holding misconstrued the case of *Kuppusamy v. Public Prosecutor* ⁽¹⁾ which ruled that an order of acquittal in summary trials can only be made under paragraphs (f), (g) and (m) of section 173 of the Criminal Procedure Code (F.M.S. Cap. 6).^{*} It in no way was meant to rule out the application of section 254(ii) of the F.M.S. Code

^{*}Note: Section 173 of the F.M.S. Code corresponds to section 182 of the S.S. Criminal Procedure Code (Cap. 21). In the F.M.S. Criminal Procedure Code paragraph (g) uses the word "discharging" instead of "acquitting" and therefore *Kuppusamy's* case should be read with this in mind.

as Mr. Justice Murray-Aynsley as he then was in that case said:—

"Section 254(ii) provides such discharge shall not amount to an acquittal *unless the court so directs*, except in cases coming under section 171. Such discharge means, however, discharge under section 254. Therefore for a discharge to amount to an acquittal without a special order of the magistrate it must fall within the provisions of section 254 as well as of section 171."

Section 187(1) of the S.S. Code is identical with section 254(ii) and the application was made under that section so that it is clear that the learned magistrate had power to order an acquittal.

This power enabling the discharge of an accused person without acquitting him is a power which should be exercised sparingly and grudgingly and only where the court is satisfied for good cause shown that the public interest insistently demands that it be used. (*Seet Ah Ann v. Public Prosecutor* ⁽²⁾). Our courts have consistently adopted the line that unless some very good ground is shown it would not be right to leave an individual for an indefinite period with a charge hanging over him. (*Goh Oon Keow v. R.* ⁽³⁾ *Tan Ah Chan v. R.* ⁽⁴⁾). As Mr. Justice Spenser-Wilkinson said in *Public Prosecutor v. Suppiah Pather* reported in *Editorial Note to Ariffin bin Cassim Jayne v. Public Prosecutor* ⁽⁵⁾ :—

"If the prosecution are not ready to proceed with their case after reasonable adjournments have been granted, an accused person should not be allowed to suffer from the dilatoriness of the prosecution by being left with a charge hanging over his head indefinitely.

"Where the prosecution are unable to proceed for the time being owing to the difficulty of obtaining a witness or for some other cause and are unable to satisfy the court that they will proceed with the prosecution within a reasonable time, then there would be good grounds for a discharge not amounting to an acquittal. In this case, however, although counsel apparently only asked for a discharge not amounting to an acquittal I think the proper order would have been a discharge amounting to an acquittal."

Accordingly, as the learned magistrate had misdirected himself as to his power to make the order, I would for myself decide whether in all the circumstances of the case such order under section 187(1) should amount to an acquittal.

This case, as the petition shows, related to an offence alleged to have been committed on 28th July, 1966 and the summons was applied for almost 5 months later on the 22nd December, 1966. The case was finally called on the 13th June, 1967 when the order appealed from was made. It can thus be seen that there was ample time for consideration before action was initiated and it seemed a little hard on the appellant if he is not to be freed from the prospect of further prosecution because police would most probably take departmental action against him. The appellant must have been extremely worried over

A a period of nearly a year, as being a detective corporal he would have been aware that a complaint had been made against him. He had also, it appears from the file, incurred expenses in connection with the attendance of witnesses. I would, having regard to the foregoing, vary the order of the learned magistrate and direct that the discharge should amount to an acquittal.

Order of discharge amounting to acquittal substituted.

C CHEE BAY HOON v. TAN CHONG & SONS MOTOR CO. LTD.

[A.C.J. (Pawan Ahmad J.) September 8, 1967]
[Malacca — Civil Appeal No. 2 of 1967]

Contract — Dealings between car dealers — Account stated — Document purported to be — Defendant's denial.

D *Practice and Procedure — Account stated — Ingredients of.*

An account stated may take the form only of a mere acknowledgment of a debt; in that case though it amounts to a promise from which the existence of a debt may be inferred that inference may be rebutted; and then there is no consideration and no binding promise. But there is another form in which the account stated includes items on both sides, and the parties have agreed that there shall be a set-off and that only the balance shall be paid; in that case there is a promise for good consideration to pay the balance even though some of the debts were barred by limitation. *Siqueira v. Noronha*, [1934] A.C. 332.

F The parties to this appeal were car dealers. The plaintiff had sued the defendants for \$1,900 as the sum due from them out of a transaction entered into between the parties based on a document, P1, which was purported to be an account stated. The defendants denied the claim and counterclaimed for the sum of \$955 on the ground of misrepresentation by the plaintiff to them.

G Held: (1) the contents of P1 did not take the form of a mere acknowledgment of a debt amounting to a promise from which an inference of debt might be inferred and therefore it did not fall under the first form. Even if it did the defendants were still not barred from denying it;

H (2) on a perusal of P1 it was clear that it also could not fall under the second form because there were no two proper columns showing the credit and debit columns and moreover the balance to be paid as shown at the bottom of P1 was the sum of \$575 and not \$1,900 as claimed by the plaintiff.

Cases referred to:—

- (1) *Hong Teck Guan & Anor. v. Lam Soon Cannery Ltd.* [1959] M.L.J. 207 at p. 209.
- (2) *Siqueira v. Noronha* [1934] A.C. 332.
- (3) *Camillo Tank Steamship Co. Ltd. v. Alexandria Engineering Works* (1921), 38 T.L.R. 134, 145.
- (4) *Laycock v. Pickles* (1863), 4 B. & S. 497.
- (5) *Savoosah & Ors. v. Hajee Ismail* (1889), 4 Ky. 453, 458.
- (6) *Subramaniam v. Retnam* [1966] 1 M.L.J. 172, 173.